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Arizona Corporation Commission

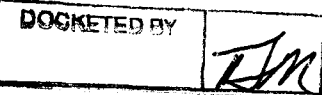
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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

COMMISSIONERS

BOB STUMP - Chairman
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IN THE MATTER OF THE PETITION OF
COLUMBUS ELECTRIC COOPERATIVE,
INC., FOR A DECLARATORY ORDER.

DOCKET NO. E-01851A-11-0415

STAFF'S RESPONSIVE BRIEF

I. PROCEDURAL BACKGROUND.

On November 18, 2011, Columbus Electric Cooperative, Inc. ("Columbus" or "Cooperative") filed with the Arizona Corporation Commission ("Commission") a Petition for Declaratory Order ("Petition") to confirm that A.R.S §§ 40-301, 40-302, 40-303 and 40-285 do not apply to Columbus in relation to past or future secured loan transactions or, alternatively, for retroactive approval of three secured loans and attendant mortgages, and for the expedited approval to prepay and refinance certain loans. In a telephonic Procedural Conference on January 5, 2012, Columbus and the Commission's Utility Division ("Staff") discussed procedures for processing Columbus' Petition. Based on the Cooperative's desire to expedite the processing of its refinancing request, the parties agreed to bifurcate the action whereby the refinancing would be addressed first ("Phase I") and the Declaratory Petition addressed following an Order issued in Phase I. By Procedural Order dated January 5, 2012, the Declaratory Petition was bifurcated from the financing/refinancing request.

The Commission issued Decision No. 73156 on May 18, 2012, whereby it adopted the Administrative Law Judge's Recommended Opinion and Order which, *inter alia*, granted Columbus' financing/refinancing request and approved the subject three pre-existing loans as well as authorized Columbus to refinance certain debt and pledge its Arizona assets in connection with the authorized indebtedness. The Decision further ordered the parties to "consult with each other and file procedural recommendations for the resolution of the Declaratory Petition."¹

¹ Decision No. 73156 at p. 7.

1 On or about February 4, 2013, counsel for Columbus contacted Staff counsel to discuss
2 resolution of the Declaratory Petition. As a result of that and subsequent communications, Columbus
3 filed a Motion for Procedural Order ("Motion") on February 28, 2013. Therein, it was noted that the
4 Cooperative and Staff agree that Decision No. 72175, in the Matter of Garkane Energy Cooperative,
5 Inc. ("*Garkane*") addressed issues similar to those presented in this case but submitted that
6 "additional information in support of [Columbus'] claim for exemption needs to be developed in this
7 matter." On that basis, the Cooperative requested that a procedural order be issued adopting the
8 briefing schedule as recommended in the Motion. On March 14, 2013, a Procedural Order ("Order")
9 was issued whereby Columbus was directed to file its brief by March 25, 2013, and Staff its brief by
10 April 29, 2013.

11 On March 21, 2013, Columbus filed a Request to Modify Procedural Order ("Request")
12 wherein a modification to the initial briefing schedule set forth in the Order was sought. Staff having
13 no objection to such Request, a second Procedural Order ("Order 2") was issued on April 1, 2013,
14 which extended the Cooperative's due date for its Initial Brief from March 25, 2013, to April 8, 2013.
15 The due dates for Staff's Responsive Brief and Columbus' Reply Brief, if any, remained as
16 previously ordered, i.e., April 29 and May 13, 2013, respectively.

17 **II. DISCUSSION.**

18 As in *Garkane*, the seminal issue in the instant matter is the applicability of A.R.S. §§ 40-301,
19 40-302, 40-303 to future financings and §40-285 to future encumbrances involving Columbus' debt
20 transactions. Although initially of a mind that the facts asserted in Columbus' Petition regarding its
21 financing and encumbrance issues were generally similar to those of *Garkane*, Staff ultimately
22 determined that the Cooperative had failed to set forth sufficient facts upon which an informed and
23 well-founded decision to that effect could be based. As a result, Staff requested that Columbus
24 adequately supplement such facts to permit a finding that the protections afforded the Cooperative's
25 Arizona ratepayers under A.R.S. §§ 40-301, 40-302, 40-303 and 40-485 were present. Based on the
26 information set forth in its Initial Brief, Staff believes the Cooperative has met such burden.

1 **A. The Facts as Presented by Columbus Satisfy the Criteria Set Forth in *Garkane*.**

2 In *Garkane*, the Commission prescribes criteria for utilities such as Columbus to meet in
3 order for A.R.S. §§ 40-301 through 40-303 and §40-285 to not apply to its financing and
4 encumbrances.² In its Initial Brief, Columbus delineates various facts intended to satisfy these
5 criteria including, without limitation, the following. Like *Garkane*, Columbus is a nonprofit rural
6 electric cooperative which has been serving Arizona customers for a significant period, in this
7 instance pursuant to a Certificate of Convenience and Necessity (“CC&N”) issued in 1962.
8 Columbus serves a total of approximately 5,259 customers, 4,782 (91%) of which are located in New
9 Mexico and 476 (9%) in Arizona.³ As was set forth in Decision No. 73156 issued in Phase I of its
10 Petition, the Cooperative demonstrated that it is financially sound with a capital structure of 2.5%
11 short-term debt, 66.9% long-term debt, 30.6% equity, a Debt Service Coverage (“DSC”) ratio of 1.67
12 and no outstanding compliance issues.

13 In addition, as *Garkane*’s financial transactions were reviewed by the Utah Public Service
14 Commission (“UPSC”), Columbus is monitored by the New Mexico Public Regulation Commission
15 (“NMPRC”) and governed by New Mexico statutes. Such transactions are also subject to significant
16 oversight by the United States Code and Code of Federal Regulations as the provisions thereof
17 pertain to Columbus as a Rural Utilities Service (“RUS”) borrower.

18 Moreover, as pointed out in its Initial Brief, due to the Commission’s prior refusals to
19 exercise jurisdiction over debt filings similar to the ones at issue, counsel for the Cooperative
20 previously sought and obtained acknowledgement from the Commission’s Legal Division that the
21 Commission lacked jurisdiction over Columbus’ debt financing. These circumstances are notably
22 similar to the facts of *Garkane* where that company’s counsel received a like communication from
23 the Commission’s then-Chief Counsel that, due to “Commerce Clause restrictions and *Garkane*’s
24 status as a foreign public service corporation engaged in interstate commerce, *Garkane* was not
25 required to obtain Commission approval of [its] finances.”⁴

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28 ² Decision No. 72175, p. 18:23 – 19:15.

³ In *Garkane*, an estimated 88.95% of the utility’s customers were located in Utah and 11.05 % in Arizona.

⁴ Decision No. 72175 at p. 2.

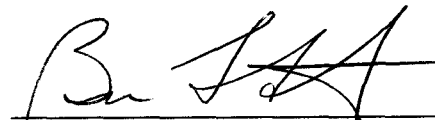
1 Based on the foregoing then existing facts, the Commission in *Garkane* determined that its
2 interest in exercising its jurisdiction to regulate financial transactions under A.R.S. §§ 40-301, 40-
3 302, 40-303 and 40-285, was clearly outweighed by the onerous impact to interstate commerce. The
4 Commission further found that *Garkane* was not required to apply for approval of each future
5 transaction which would otherwise be required under the specific provisions of those statutes.
6 However, the Commission did order *Garkane* to file, for informational purposes, any application for
7 approval of financing filed with the UPSC and any subsequent Order issued thereby.

8 As asserted in its Petition and more thoroughly in its Initial Brief, Columbus contends that the
9 facts of this matter mirror to a great degree those present in *Garkane* and that the same result should
10 obtain in this instance. Columbus further relates that it will voluntarily file with Commission Staff
11 all future financing applications filed with the New Mexico Public Service Commission as well as an
12 affidavit verifying the then-existing split of its consumers in New Mexico and Arizona.

13 **III. CONCLUSION.**

14 Given the additional factual background set forth by Columbus in its Initial Brief, together
15 with the legal analysis and facts set forth in Decision No. 72175 in *Garkane*, Staff believes Columbus
16 has adequately provided sufficient facts to warrant a finding commensurate with the Commission's
17 conclusions in *Garkane*. However, Staff would emphasize the need for the Commission to require
18 Columbus to file courtesy copies with the Commission and Staff of all future financing applications,
19 affidavits verifying its then-existing percentages of New Mexico and Arizona customers and any
20 orders issued relative thereto by the NMPRC.

21 RESPECTFULLY SUBMITTED this 29th day of April 2013.

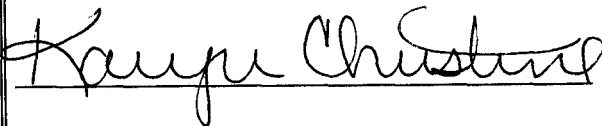
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1 Original and thirteen (13) copies
2 of the foregoing filed this
29th day of April 2013 with:

3 Docket Control
4 Arizona Corporation Commission
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6 Copy of the foregoing mailed this
29th day of April 2013 to:

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